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The death penalty

[S.l.]

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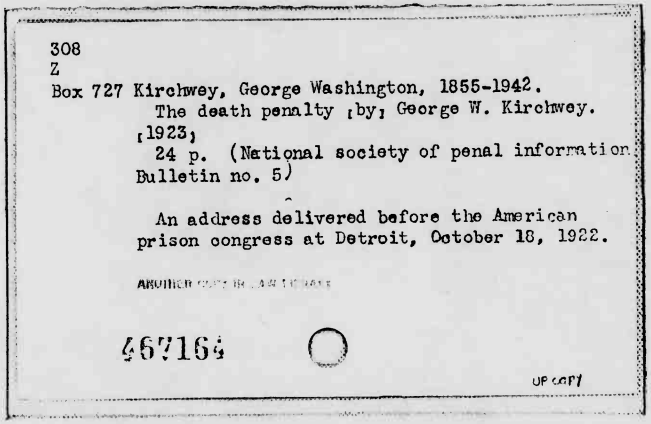
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THE DEATH PENALTY

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The National Society of Penal Information

BULLETIN NUMBER 5

Anon

BULLETIN of the NATIONAL
SOCIETY of PENAL INFORMATION
NOVEMBER, 1923

THE DEATH PENALTY[1]

GEORGE W. KIRCHWEY, L.L.D.

I am glad to find myself on this occasion pitted against my friend, Colonel Chamberlin,[2] the intrepid leader of a lost cause. I was reluctant to engage in the contest, not because the cause is not worth the battle, but for the reason that both the protagonist and the antagonist seemed to me little more than bubbles on a stream whose course we could do little or nothing to affect. Nothing that he can do or say will stay its course; nothing that I can do or say will accelerate it. For we are both of us a part of that resistless tide of humanitarianism which, more powerful than any propaganda, more conclusive than any arguments that we may employ, is sweeping on to the elimination of the death penalty.

Death Penalty Doomed

STORY OF THE STRUGGLE TO ABOLISH CAPITAL PUNISHMENT

Looked at in the perspective of time, what a short period it is in which the more tender sentiments, which are the better part of our human endowment, have gained the ascendency over the more cruel and bestial half of our human nature. From the dawn of history

[1] An address delivered before the American Prison Congress at Detroit, October 18, 1922.

[2] Henry Barrett Chamberlin, Executive Director of the Chicago Crime Commission, who had argued in favor of capital punishment for murder.

INTENTIONAL SECOND EXPOSURE

Anon

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THE DEATH PENALTY[1]

GEORGE W. KIRCHWEY, L.L.D.

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I am glad to find myself on this occasion pitted against my friend, Colonel Chamberlin,[2] the intrepid leader of a lost cause. I was reluctant to engage in the contest, not because the cause is not worth the battle, but for the reason that both the protagonist and the antagonist seemed to me little more than bubbles on a stream whose course we could do little or nothing to affect. Nothing that he can do or say will stay its course; nothing that I can do or say will accelerate it. For we are both of us a part of that resistless tide of humanitarianism which, more powerful than any propaganda, more conclusive than any arguments that we may employ, is sweeping on to the elimination of the death penalty.

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life had been a shambles. We talk of the sacredness of human life, but that sacredness is not a fundamental principle or an original endowment of humanity, but an achievement, or shall I say, an aspiration, of what I have ventured to call the better part of our dual nature. As described by Tennyson, it is a *process*—that of working out the beast and letting the ape and tiger die. And today, even in the imperfect degree to which that process has been carried in our own humaner civilization, it is a possession of only a small part of the world. In this morning's paper there is an appalling picture drawn by Maxim Gorky, of the incredible cruelties that are the note, one may say, of everyday life in Russia. The revolution in that ill-fated country was only the release of instincts and passions which are characteristic of a backward people whose daily life is an orgie of cruelty—cruelty of the "red" to the "white," cruelty of the "white" to the "red," cruelty to women, cruelty to children. There is enough cruelty of all those kinds among us, God knows! but in our land it has happily become only sporadic, not an integral part of life itself, and here it has no longer any official recognition except in the persistence of the death penalty for murder and a few other crimes.

Modern Revolt Against Cruelty

It was the great Beccaria who, in 1764, a little more than a century and a half ago, sounded the death knell of official cruelty. When his epoch-making pamphlet, "Crimes and Punishments," was given to the world, torture—torture to enforce confession of guilt—was prescribed and practiced as an ordinary incident of legal procedure in every country of continental Europe (it had never been sanctioned by the English Common Law) and death was the ordinary penalty for crime. According to Blackstone there were not less than 163

Beccaria Starts Movement

forms of crime punishable by hanging in England in his time. That Beccaria spoke not for himself alone or for the humanists of his day is demonstrated by the fact that his words went like a clarion call over the continent and resulted in all but the complete abolition of torture and the disappearance of the death penalty for most offenses within the short term of a single generation.

England, which is little affected by movements of thought on the continent, clung to her drastic system of capital punishment for still another generation, striving vainly to stem the tide of criminality by adding new offenses to the death list—the number of crimes punishable by death having, we are told, been doubled in the reign of George III. But the humanitarian sentiment that reformed the criminal codes of the Continent wrecked the criminal code of England. Juries refused to convict until parliament was forced to choose between letting criminals go free and substituting a milder penalty.

England Stops Execution for Minor Crimes

But the struggle for "The nobler modes of life; With sweeter manners, purer laws" in England was a long and bitter one. Even as late as 1837 there were still 37 capital offenses on the statute book, a number which was shortly thereafter reduced to two—wilful murder and treason.

It is disconcerting to read the literature of that long and acrimonious debate. Mr. Chamberlin hasn't advanced an argument for the retention of capital punishment for murder that was not employed by Lord Eldon, Lord Ellenborough and the great Paley for its necessity in cases of shop-lifting and for stealing a handkerchief from the person, and I shall say little or nothing that was not better said by Romilly and Sir

Arguments for and Against Are Old

William Mackintosh. As one looks back, one feels how futile was the debate, how irresistible the tide that discredited and then swept away that ancient survival of primitive cruelty.

THE ARGUMENT FOR CAPITAL PUNISHMENT

In the great debate, then and now, I find three arguments for the retention of the death penalty.

Vengeance

First. The human need of meeting violence with violence, crime with expiatory vengeance. "I think it highly desirable that criminals should be hated," said Mr. Justice Fitzjames Stephen,[1] and "that the punishments inflicted upon them should be so contrived as to give expression to that hatred."

Elimination of Criminal

Second. The social necessity of eliminating from society those who are a menace to its life and security.

Deterrent Effect

Third. The necessity of imposing a punishment which will have the maximum deterrent effect on others who are under temptation to commit similar offenses.

Let us briefly examine these arguments:

Hatred and Revenge no Longer Upheld

The first of them may, I am sure, be summarily disposed of. While, I believe, the vindictive sentiment is latent in all our hearts and finds expression in many features of our punitive legal system, it is no longer respectable to avow it or to admit its existence. No protagonist of that system would today subscribe to Justice Stephen's declaration of principles. Mr. Chamberlin would be the first to disavow the doctrine that criminals should be hated and that the law should be so framed as to declare and encourage that hatred.

[1] Sir James Fitzjames Stephen, History of the Criminal Law of England (1883) vol. II p. 82.

The growth of humanitarian sentiment in the last generation has put the quietus on that argument.

Elimination Unscientific

The second argument is defective because of its unscientific selection of those who are, for the good of society, to be eliminated. From the point of view of eugenics there is, abstractly speaking, something to be said for a policy of elimination of the socially unfit. But why pick on the murderer? He is by no means the worst of the lot. On the contrary he is the one who is chosen by the prison warden for tasks involving trust and responsibility both within and without the prison walls. On the convict farm of a great western penitentiary a few months ago, I found thirty-five murderers in the colony of fifty-two men who were working and living practically unguarded at a distance of several miles from the prison.

Murderers Not Socially Most Unfit

I was new to prison life when, at Sing Sing in the winter of 1915-16, the Principal Keeper, an old prison official, applied to me for instructions as to the guarding of the squad of thirty inmates whom he had selected for the duty of cutting ice on the pond outside the prison wall. He couldn't spare keepers to guard them. I asked him what kind of men he had picked for the work. "The best men in the prison," he answered, "every one of them a lifer." Now, a "lifer" is a man who is doing a life sentence for murder.

Best Men in the Prison

Not Criminal By Nature

The argument for the elimination of the murderer as a menace to society is founded on an assumption which everyone who has an intimate knowledge of men convicted of murder knows to be baseless; namely, that murderers are murderers by nature, men prone to kill, or, on the other hand, that they constitute a professional class like burglars, pick-pockets, robbers, and the like. Each of these types may be represented among those

whom the law has branded as murderers, but they constitute an insignificant fraction of the total number.

Among the thirty men whom I knew in the death-house at Sing Sing and the 200 or more who were "doing life," I found only half a dozen who seemed to answer that description—one of them a reputed "gunman" from New York City, who became violently insane a few days before his execution, and another, the only person I ever knew who seemed entirely devoid of any sentiments of pity or sympathy and who was diagnosed by the physicians as a psychopathic personality. Doubtless the execution of these men was no loss to the world, but most of the others seemed to me to be of the type described by Sir Basil Thompson, the head of the British Secret Service, in his recent work,[1] "You have to be in charge of a prison," he says, "in order to realize that the murderer is rarely a criminal by nature at all. But for the grace of God he is just as you and I, only more unlucky. Most murders are committed without any deep laid plot. * * * The murderer is repentant and is planning only how he can earn an honest living after he is discharged."

Sick, Tortured Souls

If this seems a bit too sweeping, let me assure you that it is far nearer the truth than is the popular conception of the murderer. I made it my business to know every man in the death-house while I was at Sing Sing. The only characteristic that they had in common was that they were sick, tortured souls over whom hung the pall of the awful fate that awaited them. Only a few of them were criminals in the ordinary sense of the term and one, whose death sentence had been commuted to imprisonment for life, complained to me of the fact that he was in a situation where he could get

[1] My Experiences at Scotland Yard; New York, 1922.

so little decent companionship. There were so many crooks. A few of my murderers were obviously feeble-minded, a few apparently insane or psychopathic, but most were of the kind described by Sir Basil Thompson, men who, but for the accident of fate—some jam in the wheels of life, some uprush of upsetting emotion, some bewilderment of the faculties—might have been even as you and I are this day.

Caught in a Jam

I trust that, in thus controverting the popular notion as to the character of the man who kills, I shall not be suspected of being insensible to the horror of his crime. When people speak of the sacredness of human life, I, like other well-regulated folk, think rather of the innocent victim and of those bereft by his slaughter than of the fate which society pronounces on the slayer. But no pity for the victim, no sentiment of horror which the crime arouses, can absolve us from the obligation to deal with the offense and the offender in the interests of humanity and of the welfare of the community. The sentimentality which impels us to strike out blindly and savagely at the murderer is as weak and demoralizing as the sentimentality that sees in him only a pitiable victim of a murderous system of justice. Both are equally unworthy of the good citizen, both equally destructive of the moral tone of a civilized society.

No Room for Sentimentality

To such a society, governed by reason and not by passion, all murderers will cease to look alike, and the popular picture of the murderer as the pestilential enemy, whom it is necessary to kill as one kills a man-eating tiger, will find its proper place along with other outworn delusions, with the heretic, the witch and the man possessed of a devil.

With the third argument for capital punishment—the value and the necessity of the death penalty as a

Deterrence a Matter of Conjecture

deterrent influence—we enter a wide field of conjecture. A humanitarian age puts the burden of proof on those who would maintain the barbarous practice, but no proof is forthcoming. The statistical evidence is, at best, negative or conflicting. Isolated instances which seem to show the efficacy of the remedy are matched by other instances which show the contrary.

If Colonel Chamberlin can point to a reduction of the murder rate in Chicago following upon a rigorous enforcement of the criminal law, I can cite orgies of homicide following upon a single execution. Thus the hanging of the notorious Kemmler at Auburn Prison, New York, a few years ago, was celebrated by twenty-four murders in New York, ten in New Jersey and ten in Pittsburgh, all within the space of thirty days. Editors of leading newspapers in several cities called attention to the startling coincidence, and demanded evidence that the infliction of the death penalty did not operate as a direct incitement to murder. On June 21, 1877, ten men were hanged in Pennsylvania for murderous conspiracy. The New York Herald predicted the wholesome effect of the terrible lesson. "We may be certain," it said, "that the pitiless severity of the law will deter the most wicked from anything like the imitation of these crimes." Yet, the night after this large scale execution, two of the witnesses at the trial of these men had been murdered, and within two weeks five of the prosecutors had met the same fate.[1] In the latter part of the year 1915, Police Lieutenant Becker and four gunmen, alleged to have been hired by him, were electrocuted at Sing Sing for the murder of Rosenthal, a New York gambler. Yet, when I was warden of Sing Sing in the early months of 1916, there were

Outbreaks of Murder Follow Executions

[1] A. F. Schuster in the Nineteenth Century, October, 1912.

in the death-house five men awaiting execution for murders committed under precisely similar circumstances only a few weeks subsequently to the execution of the gunmen.

Let us beware of the argument *post hoc ergo propter hoc*. It is a notorious logical fallacy. Let us also guard against "the will to believe." It is the great enemy of reason.

No Trustworthy Statistics of Murder

Turning from this wilderness of single instances, in which the heedless traveler may so easily lose his way, I do not propose to lead you into the more impenetrable wilderness of criminal statistics; and that for two reasons. In the first place, we have no trustworthy statistics of murder in the United States. The two sources of information on which we are compelled to rely, The Chicago Tribune and the United States Census Bureau, derive their information from newspaper stories of crime and from the imperfect and oft-times garbled reports of the police as to crimes reported to them, and the two authorities are wide apart in their conclusions. In fact, The Chicago Tribune reports nearly twice the number of homicides that the Census Bureau is able to discover. But even if our figures were reliable we should still be far from establishing a relation between murder and the death penalty, inasmuch as the statistics do not discriminate between wilful and accidental or excusable varieties of homicide—murder, first and second degree; manslaughter, first and second degree; excusable homicide and justifiable homicide—only the first and rarest of which, deliberate and premeditated murder not committed in the heat of passion or on a sudden impulse, is punishable by death. As only a trial can determine to which of these classes a given homicide belongs, and murder. The criminal law recognizes six different

Only Two Sources of Information

Different Kinds of Homicide

as only a small percentage of known homicides are, in fact, ever brought to trial, it is certainly "going some" to argue from the general homicide rate in a given year to the efficacy of the death penalty as administered in the same city or county during the preceding year.

Confusion of Terms, "Murder" and "Homicide"

Colonel Chamberlin has told us that in 1921, following the fifteen hangings and death sentences of 1920, the murder rate fell off fifty-one percent in Chicago. Let us accept his statement, incredible as it seems and in the face of the fact that it is disputed by an eminent criminologist.[1] Colonel Chamberlin says "murders," but he means "homicides." The only actual murders that he knows of are the handful in which a verdict was rendered after a trial. He knows no more than you or I do how many of the other homicides were wilful and deliberate murders. He is assuming as a fact a thing that has never been established and one that is in the highest degree improbable,—namely, that there is a constant ratio, year by year, between the number of wilful, deliberate murders and the total number of homicides committed. I venture to say that there is not even a speculative basis for such an assumption. It is a blind guess, a leap in the dark.

In turning now to the second point of my argument relative to the bearing of homicide statistics on the question of the deterrent effect of capital punishment, you may wonder why I should have been at such pains to prove their worthlessness. For the fact is that, taking the figures at their face value, they prove absolutely nothing for or against the death penalty. The figures as to the percentage of homicides in states and countries

[1] Professor Edith Abbott, of the University of Chicago, in the Journal of Criminal Law and Criminology, vol. XIII, pp. 351-5, to the effect that there was a marked rise in the homicide rate in Chicago in 1921 over 1920.

having the death penalty and in those that have abolished it, practically cancel one another. In some places, here and abroad, there appears to be a slight rise in the homicide rate following the abolition of capital punishment. In at least as many others the statistics are to the contrary effect.

Statistics a Complete Stand-off

Gov. Davis' Study of States' Experience

The data relating to this phase of the problem have recently been studied in detail by Governor Harry L. Davis of Ohio,[1] who compared the homicide rate "before and after taking" in the five states (Missouri, Tennessee, Oregon, Washington and Arizona) which, after a repeal of the death penalty, had recently re-enacted it, and who made a similar comparison as between states which had abolished capital punishment and others of like economic and social conditions which retained the death penalty. The following paragraphs may be taken as fairly representative of the entire report:

"In the eastern group of states, Maine, without the death penalty, has the lowest homicide rate in the country—1.5 for each 100,000 inhabitants—from 1915 to 1919, with New Hampshire's ratio just a fraction higher, with capital punishment. Rhode Island, an abolition state, averaged 3.3 murders, as against its neighbors, Vermont, Massachusetts and Connecticut, where homicides ranged from 2 to 3.9 per 100,000 population. In the Middle West, Michigan, Wisconsin and Minnesota, without capital punishment, are shown by the same statistics to have a homicide rate of 4, 2.2 and 3.2 per 100,000, while the corresponding average in Ohio, Indiana and Illinois, with capital punishment is 7.8, 5.1 and 7.5 respectively."

"No Southern State is without capital punishment;

[1] Death by Law; The Outlook, July 26, 1922.

but in the West the record of Kansas of 6.8 homicides per 100,000 population, with no capital punishment, is comparable with Colorado with an average of 9.2, and Utah of 5.6, where the death penalty prevails."[1]

"Deterrent Effect Mythical"

And this is Governor Davis' conclusion: "It is thus easily to be seen that, on the whole, it appears to make little difference in the prevalence or scarcity of homicides whether the punishment is death or life imprisonment. In fact, there would seem to be a slight lessening of homicides where no death penalty exists. At any rate, these figures tend definitely to show that the deterrent effect of capital punishment is largely mythical and merely an imaginary factor."

In Foreign Countries

The same uncertainty and vacillation with respect to the efficacy of capital punishment which we have noted in this country appears to prevail in Europe and other foreign countries as well. Where, as in Holland, Italy, Norway and most of the Swiss Cantons, the death penalty has long been dispensed with, no increase in homicidal crime has resulted. In some of these countries, indeed, there has been a notable decrease, as, for example, in Italy, where, it is reported, there have been no executions since 1876, though the death penalty was not formally abolished until 1888. It is significant that, following this legislation, the percentage of homicides based on 100,000 population fell from 9.68 for the period 1860-1886 to 6.93 for the period 1890-1892, and to 5.52 in 1903.[2] It would be absurd to claim this reduction in the homicide rate as a consequence of the abolition of capital punishment, but it may well be viewed with alarm by Colonel Chamberlin

[1] The more elaborate statistics, covering a longer period of years, given in Bye's Capital Punishment in the U. S. pp. 12-46, are to the same effect.

[2] Handbook of Capital Punishment; National Committee on Prisons and Prison Labor, New York, 1916.

and others who believe that only that society is safe which lives under the shadow of the gallows. The only conclusion that can be ventured on is this: that there is not a scintilla of evidence that the abolition of the death penalty in any American state or in any foreign country has had any appreciable effect on the security of life in the community that has ventured on the experiment.[1]

Deterrent Effect Not Proven

This may seem to some of my hearers a lame and impotent conclusion, but it is something to have made good the Scottish verdict, "not proven." Once out of the labyrinth of statistics, we shall find light on the path that we have to traverse.

THE ARGUMENT AGAINST CAPITAL PUNISHMENT

1. There is first the light of history.

History Condemns Capital Punishment

It must not be forgotten that the death penalty, which is struggling on to its inglorious end among us today, has been tried before on a colossal scale and judged and found wanting. Reference has already been made to the savage penal system maintained in England for half a thousand years when the hangman lay in wait for every petty offender. But what is not generally known is that the growth of this system represented the desperate effort of the better elements of the community to cope with an increasing flood of criminality. To produce the maximum deterrent effect, the execution of malefactors was made a public spectacle attended by curious or morbid crowds in which thieves and robbers and murderers plied their trade. But it was of no use. As death penalties multiplied, capital offenses multiplied, until the whole abominable

[1] For statistics see article by A. F. Schuster referred to above.

system collapsed in the weariness and disgust of the commons of England. And then, as the social histories of the last century show us, as the gallows faded into the background of English life a new sense of law and order and of the worth and dignity of life came to pervade the community and we find ourselves in "the glad, confident morning" of Victorian England.

A Complete Failure

I draw no unwarranted or extravagant conclusions from this picture. I don't ask you to believe that this social transformation resulted from the abolition of the death penalty, but only that the two processes went hand in hand in the swift amelioration of manners that marked the period, and, further, that the bankruptcy of the death penalty as a means of curbing crime was once and for all time demonstrated.

2. Then there is the light of experience.

Test is Certainty, Not Severity

It has become a truism that it is not the severity but the certainty of punishment that gives it its deterrent effect. We recognize this at once in the case of the dog or child in whom we seek by the dread of punishment to form the habits that we think it desirable to inculcate. Is the case different with children of larger growth? If these are more reflective, they are also shrewder, more given to calculating chances. Who can tell us what the danger of detection and punishment is in the case of the man or woman plotting a murder? In England, with their highly efficient methods of administering criminal justice, it is calculated that they get and punish one out of six malefactors. In this country, with our more slip-shod methods of detection and criminal procedure, it is estimated that not one murderer in ten is apprehended and not one in twenty punished, and that one rarely with death.

Can it be seriously argued that a phantom terror

such as this can exercise any serious deterrent effect? In the year preceding Colonel Chamberlin's banner year of 1920, when, as he tells us, by superhuman effort seven men were executed and eight more sentenced for murder, there were, according to his own statement, 330 murders committed in the same jurisdiction. What fact will be most likely to affect the purpose of a subsequent gunman—the 4.5 per cent. who were unlucky enough to be caught, convicted and hanged or the 95.5 per cent. who escaped the legal penalty?

Few Murderers Caught

Mr. R. T. Bye, in a work previously referred to, declares that out of more than 7,000 homicides (estimated) in the United States in 1917, only 85 were executed. "That means," he says, "that only one man in 80 who commits a homicide suffers death for it. * * * Of course, not every homicide is deliberate murder, but, even if not more than half can be so classed, it is still true that one murderer out of every 35 or 40 pays the full penalty of his act. These figures render the deterrent argument in favor of capital punishment extremely weak. Every criminal knows that few murderers are executed and he reasonably expects to be one of the 34 out of every 35 who are spared the extreme punishment."

The Reasons

This chancy character of our criminal procedure is due to a variety of causes, ranging from the sensational and inefficient methods of the police and detective service to the technicalities imposed on the trial procedure by our appellate courts and the ease with which the pardon power can be called into play. Perhaps the worst feature of the system, from this point of view, is the delay in bringing the offender to justice. Everyone recognizes that the deterrent effect of punishment depends on its swiftness as well as on its certainty.

The criminal who has lain in jail or been at large for months or years, until everybody has forgotten him and his crime, comes to be regarded as the victim of a system which kills to make good, rather than an awful example of the consequences of crime. Last year there were four men executed in the Cook County Jail, Chicago, who had been kept in confinement there for from 15 to 18 months. In the death-house in Sing Sing Prison, in January, 1916, there were eighteen or twenty men awaiting death in the electric chair, over half of whom had been waiting more than a year, several more than two years and one nearly four years. The last named had had three trials and was expecting a fourth.

Better System Hoped for

Let us recognize the fact that there is a widespread movement afoot in this country to remedy these evils and to make our criminal procedure more swift and certain. The crest of that wave is represented here this evening by Colonel Chamberlin, the capable executive head and director of the Chicago Crime Commission, which was created under his inspiration for that very purpose. Power to his right hand! That our processes of criminal justice shall cease to be the "disgrace to our civilization" which President Taft in 1909 declared them to be, is a consummation devoutly to be wished. I suspect that if I were here and now to put to Colonel Chamberlin the direct question: "Do you really believe that our penal law as at present administered in Chicago or elsewhere in this country really operates to any considerable degree as a deterrent to murder?", he would answer, "Perhaps not at present, but we hope to make it so." Certainly he believes that if it is not now a deterrent it can and will be made so in the future. Frankly, I cannot share that belief. The present movement will not, I am sure, be barren of results. With a growing sense of judicial respon-

sibility and a new spirit of co-operation between the courts and the prosecuting attorney, we may, indeed, hope that there will be a speeding up of the criminal process, with the elimination of many of the technicalities which now too often make a farce of criminal justice; but I submit that nothing that we can hope to accomplish in that direction will relieve the death penalty of its precarious character. It will to the end be a gamble, with the chances enormously in favor of the murderer.

But Will Not Increase Executions

For this conviction I have two reasons—the increasing unwillingness of juries to convict of murder in the first degree and the inveterate tendency of governors of states to employ the pardon power to save men from the gallows or the electric chair. In Chicago recently I found the judges of the criminal court, the state's attorney and Colonel Chamberlin all together, lamenting the fact that, however clear the case, juries would not convict in capital cases. I hear the same cry in New York, here in Detroit, in many other cities. It is countrywide. In the same way there come to my ears complaints of the abuse of the pardon power. And then, more sinister still, I hear the charge that in all but the worst or most sensational cases, there is a tacit conspiracy between judge and district attorney and jury to cheat the gallows of its victim.

Juries and Governors Bar Death Penalty

What does Colonel Chamberlin propose to do about this? Will any improvement of the machinery of criminal justice give us hard-boiled, lawfearing judges and jurors and prosecuting officials and governors? Don't you see that what we are up against is the very situation that wrecked the English penal system of a century ago by this identical process of bringing it into contempt? You may call it sentimentality, if you

please, or you may denounce it as lawlessness. That may do you good, but where does it get you? It is a fact, a terrible fact, that you, Colonel Chamberlin, and those who, like you, believe in the possibility of making capital punishment an instrument of effectual restraint of murder, must take into account. There is no such thing as the automatic enforcement of law. Law is law only in so far as public opinion permits or compels its enforcement, and public opinion in the United States has set the seal of its condemnation on the death penalty.

Public Opinion Against It

3. And finally there is the light of psychology.

Thus far, in arguing for and against the deterrent effect of the death penalty, we have given little or no consideration to the state of mind in which murder is almost invariably committed. In taking up this phase of the problem we emerge from the field of conjecture into the clear light of scientific knowledge.

Psychology Throws Light

The old, naive conception that every act of our lives is a calculated, purposeful effort was still dominant when the battle over capital punishment was fought in England. It has in popular understanding persisted to our own day and it still governs the policy of the law and the attitude of its agents. But modern psychology has given a rude shock to the proud conviction that we are at all times and under all circumstances the masters of our fate and captains of our souls. It appears that we are only to a limited extent, even in our calmer moods, the thinking and planning creatures that we deem ourselves, that reason plays a subordinate part and that impulse and habit determine most of our activities. This is especially true at times of great emotional excitement or under intense strain, when we "see red" and plunge into action with little or no reflection. Even reflection at such times is little more than a re-

Our Lives Controlled by Emotion More Than by Reason

hearsal of grievances, a brooding over real or fancied wrongs, a process which distorts the perspective and confuses the issue instead of clarifying them.

Read the accounts of the murders that fill the columns of our newspapers and try to estimate the extent to which cool reflection and calculation of consequences enter into the act. Even when in the legal sense the act is deliberate, note how inevitably, under the circumstances, the ordinary processes of reasoning are suspended or confused or pushed into the background. It is almost true to say that in a civilized community nobody in his right mind kills or can kill another in cold blood. Call the person normal if you will; his act is abnormal and the result of an abnormal state of mind in which the calculation of consequences is out of the question. "My God! What have I done!" was the cry of a murderer after the commission of his act, an act of deliberate killing, for which he would have paid the penalty of death in Sing Sing if a tender-hearted governor had not commuted the sentence to imprisonment for life. I strongly suspect that nine murderers out of ten echo that same despairing cry. With the shock of realization, after the awakening, their bloodstained hands and souls overwhelm them with the horror that you and I would experience. And if the murderer should be, as he often is, feebleminded or a psychopathic case or the victim of insane delusions, how futile it seems to throw across his path the dim shadow of the far-away gallows or electric chair.

Murderer Acts Under Great Strain

"My God! What Have I Done!"

You do not invalidate this reasoning by pointing to a few actual or hypothetical cases where murder has been deliberately plotted with the death penalty in mind. These are the exceptional cases and I can see neither reason nor justice in the policy of hanging or

Cold-blooded Murder Rare

electrocuting a hundred men for the sake of deterring one, like Colonel Chamberlin's monster.

It is upon these unstable foundations that the whole structure of capital punishment stands. But the argument against the system is not confined to the demonstration of its worthlessness as a safeguard of human life and security. It is itself a menace to human life and security. It works out its fatal results through an elaborate mechanism of so-called justice, which is itself so imperfect that it inspires dread rather than confidence. From the police administration, which subjects three persons to the ignominy of arrest for every one held for judicial action, to the jury trial and the judgment on appeal, it is what President Taft called it—a disgrace to our civilization. No one has criticized the system and its procedure more severely than Colonel Chamberlin. What has stirred his righteous indignation is the inefficiency which lets the vilest criminal go unscathed. What has excited mine is the slaughter of the innocents. How many innocent men undergo the death penalty will never be known. Dead men tell no tales and few of them find such a vindicator as the pitiful Calas found in Voltaire. Sir James Mackintosh declared that at least one innocent man was hanged by the High Court in England every three years. How many do you suppose our five hundred American criminal courts, with their less exact procedure, execute every year?

Slaughter of the Innocents

I am not referring to the numerous cases of those, technically guilty of murder, who are doomed to death by the antiquated test of mental irresponsibility to which our criminal law clings and which makes no allowance for newly discovered forms of mental disease and defect. One such a case in the Sing Sing death-house

I shall never forget—a pathetic Italian, submerged in melancholia, who had taken the life of his only child in order to save it from the misfortune of living in such a world as the father had found this to be. What I have in mind is the verified cases of actual miscarriage of justice. Such was the case of Charlie Stielow, four times brought by successive reprieves to the very threshold of the death chamber in Sing Sing and finally pardoned through the discovery of his complete innocence of any connection with the murder of which he had been convicted. It was only the chance discovery of a clue and the persistent devotion of newfound friends that saved this man to go back and resume his blameless life with his wife and children. Lord Shaw of Dunfermline, the distinguished Scottish lawyer and judge who was the honored guest of the American Bar Association at its recent meeting in San Francisco, tells us that he became an enemy of capital punishment through a similar accidental discovery of the innocence of a client who had been convicted of murder and whom he himself had believed guilty.

Stielow Case

Not everyone tried for murder has such a lawyer as Lord Shaw nor such friends as Charlie Stielow found, and chance works too fitfully to be depended on to save all the victims of justice. The type of lawyer that falls to the lot of the poor in our criminal courts, their friendlessness and lack of financial resources, leaves them too often at the mercy of the shrewd and practiced district attorney whose business it is to convict and who cannot afford to indulge the scruples or to encourage the doubts that hamper efficiency. Clearly, for such as these, the dice of justice are loaded.

But I would go further. To those who, like Colonel Chamberlin, believe in the perfectibility of our system of criminal justice, and who entertain the vision of a

Fallibility of Human Justice

system that works with the swiftness, the precision and regard for human rights of the English system, I have this to say: *No human instrumentality is fit to pronounce and execute an irrevocable judgment.* Only omniscience, directed by infinite wisdom and charity, can be entrusted with that awful power. "Vengeance is *mine;* I will repay," saith the Lord. And to us he says, "Judge not, that ye be not judged." So, like Lafayette, "I shall continue to demand the abolition of the death penalty until I have the infallibility of human judgments demonstrated to me."

Death Penalty a Check to Human Progress

Here, on the bare plane of justice and expediency, we might let our argument rest, in the full confidence that a system which violated both those canons of civilized living cannot much longer be endured. But the problem has a deeper aspect. Justice and expediency are not enough. The whole upward struggle of humanity is an effort to realize and consecrate new human values, a nobler range of feeling. It is not enough to "let the ape and tiger die." The one must be supplanted by the *man,* "looking before and after;" the other by the finer feelings which are embodied in the humanitarian sentiment to which I have previously referred. What, then, can be said for a system of punishment which keeps reviving in us the sentiments of hatred and cruelty which are our worst inheritance from our animal forbears? We aim to inculcate a respect for human life by ourselves showing our contempt for human life. Some of the most tragic effects of this procedure have been noticed in an earlier part of this paper. But there is no way of estimating the more general and subtle demoralization which it produces. It is probably no exaggeration to say that every execution is accompanied by a distinct lowering of the moral tone of the entire community. Its only redeeming feature is the horror it excites in more sensitive natures. To the much larger number, to whom it presents itself as an act of vengeance, a gratification of primitive blood-lust, it is an unmixed moral evil.

Demoralizing Effect on Community

Methods All Cruel and Equally Sensational

From this point of view there is little to choose between the various methods that are "mercifully" employed to inflict the death penalty. The guillotine, the hangman's rope, the electric chair, the lethal chamber—all are equally revolting to human feeling, all become equally sensational, all are equally cruel. Indeed, the cold-blooded, deliberate killing of the criminal by the state, by whatever method, is the refinement of cruelty, and the victim dies a hundred deaths before he is mercifully relieved by the actual extinction of life and feeling.

From Standpoint of Social Betterment

In this study of the system of capital punishment I have left for the last what seems to me, from the point of view of social betterment, its worst effect—that it supplies a psychological refuge from the duty of dealing realistically with the problem of the persistence of murder in our civilization. "Off with his head! So much for Buckingham!" cried the King. It was done and that was the end of Buckingham. Nothing could be simpler—if there was only one traitor to be dealt with. But, if Buckingham was only a type or a symptom, what a lame and impotent conclusion it was, after all!

A profound student of human nature[1] has recently reminded us that "causes are not excuses," meaning that our immediate concern is the character of the individual, not how he came to be what he is. The question for us, however, is not how to deal with the individual, but with a condition of which the individual

[1] John Dewey; Human Nature and Conduct.

is only a symptom, and from this point of view our concern is the causes that have made him and others like him what they are—not to find excuses, but remedies.

Aim Should Be Remedy, Not Punishment

It is an over-simplified view of a complex social phenomenon that makes it possible for us to believe that a grave social menace can be seriously modified by the processes of legal justice. I am sure that Colonel Chamberlin will agree that such a phenomenon as the persistence and increase of the murder rate in our civilization has a profounder cause than the inefficiency of our system of criminal justice, and that if we are to eradicate or even appreciably modify the evil, we must go to the root of the matter, find the deep-lying causes and deal with them. It is not the *murderer*, but *murder*, that is the enemy. The primitive method of striking blindly, in impotent rage, at the life of the offender has had its day, but it still obscures our vision as to the real nature of our problem. Let us here and now dedicate ourselves to the task of bringing in the new day when justice shall have become humane, and humanitarianism wise, and both shall work together for a better social order.

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